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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92052901
Party	Defendant Wala Industries, Inc.
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Submission	Answer
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Date	10/26/2010
Attachments	WHATALOTAAnswerSigned.pdf (7 pages)(73530 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Whataburger Partnership LP)	
)	
Petitioner,)	
)	
v.)	CANCELLATION NO. 92052901
)	REGISTRATION NO. 2842218
Wala Industries, Inc.)	
)	
Registrant.)	

ANSWER TO PETITION TO CANCEL

Registrant and Respondent Wala Industries, Inc., by and through its undersigned attorney of record, answers the above-identified Petition to Cancel filed by Whataburger Partnership (Petitioner) as follows:

First Unnumbered Paragraph: Registrant is without sufficient knowledge or information to form a belief regarding the truth of Petitioner's business entity status or address. Registrant denies that Petitioner is being damaged by the continued registration of Registration No. 2842218.

1. Registrant lacks sufficient information or knowledge to form a belief regarding the allegations in Paragraph 1 of the Petition to Cancel, and on that basis denies the allegations in Paragraph 1.

2. Registrant lacks sufficient information or knowledge to form a belief regarding the allegations in Paragraph 2 of the Petition to Cancel, and on that basis denies the allegations in Paragraph 2.

3. Registrant lacks sufficient information or knowledge to form a belief regarding the allegations in Paragraph 3 of the Petition to Cancel, and on that basis denies the allegations in Paragraph 3.

4. Registrant lacks sufficient information or knowledge to form a belief regarding the allegations in Paragraph 4 of the Petition to Cancel, and on that basis denies the allegations in Paragraph 4.

5. Registrant lacks sufficient information or knowledge to form a belief regarding the allegations in Paragraph 5 of the Petition to Cancel, and on that basis denies the allegations in Paragraph 5.

6. Registrant lacks sufficient information or knowledge to form a belief regarding the allegations in Paragraph 6 of the Petition to Cancel, and on that basis denies the allegations in Paragraph 6.

7. Registrant lacks sufficient information or knowledge to form a belief regarding the allegations in Paragraph 7 of the Petition to Cancel, and on that basis denies the allegations in Paragraph 7.

8. Registrant lacks sufficient information or knowledge to form a belief regarding the allegations in Paragraph 8 of the Petition to Cancel, and on that basis denies the allegations in Paragraph 8.

9 Registrant lacks sufficient information or knowledge to form a belief regarding the allegations in Paragraph 9 of the Petition to Cancel, and on that basis denies the allegations in Paragraph 9.

10. Registrant admits the allegation in Paragraph 10 of the Petition to Cancel.

11. Registrant admits the allegation in Paragraph 11 of the Petition to Cancel.

12. Registrant denies the allegation of Paragraph 12.
13. Registrant admits the allegation of Paragraph 13.
14. Registrant denies the allegation of Paragraph 14.
15. Registrant denies the allegation of Paragraph 15.

Second unnumbered paragraph: Registrant denies that Petitioner is entitled to have its Petition for Cancellation sustained.

Third unnumbered paragraph: Registrant lacks sufficient information or knowledge to form a belief regarding the truth of the allegation in the third unnumbered paragraph of the Petition, and on that basis denies the allegation in the third unnumbered paragraph.

Fourth unnumbered paragraph: Registrant lacks sufficient information or knowledge to form a belief as to the truth of the allegations in the fourth unnumbered paragraph of the Petition to Cancel, and on that basis denies the allegations in the fourth unnumbered paragraph.

AFFIRMATIVE DEFENSES

In further answer to the Petition to Cancel and without waiver of any objection or an admission of sufficiency of the Petition to Cancel, Registrant asserts upon information and belief:

1. Petitioner's Petition to Cancel fails to state a claim upon which relief can be granted, and in particular fails to state legally sufficient grounds for sustaining the Petition to Cancel, based upon the following facts. The sole grounds available to Petitioner for sustaining the Petition is Petitioner's allegation of Registrant's abandonment of U.S. Registration No. 2842218. However, the foregoing registration became incontestable on

May 18, 2009, that date being the fifth anniversary of its registration date. Registrant filed with the USPTO on October 3, 2010 a Declaration of Continued Use under Section 8 of the subject mark, thus removing abandonment as grounds for sustaining the Petition.

2. Petitioner's Petition to Cancel is barred by Acquiescence, based upon the following facts. Petitioner alleges in Paragraph 16 of the Petition that Registrant's Mark is likely to be confused with the WHATABURGER and WHATA Marks. Petitioner lists in Paragraph 7 of the Petition 19 Marks, designated (a) through (s). Fourteen of Petitioner's listed Marks, namely those Marks designated (a) through (n) were registered before publication for opposition on April 29, 2005 of Registrant's Mark, WHAT A LOT A PIZZA, Reg. No. 2740030. Fifteen of Petitioner's listed Marks, namely, those marks designated (a) through (o) were registered before publication for opposition on February 24, 2004 of Registrant's Mark, WHAT A LOT A PIZZA and design, Registration No. 2842218. Petitioner's failure to oppose registration of either of Registration Nos. 2740030 or 2842218 evidences the fact that Petitioner has acquiesced to Registrant's adoption, registration, and continued use of both Registration Nos. 2740030 and 2842218.

3. Petitioner's Petition to Cancel is barred by the Doctrine of Laches and Estoppel. Petitioner's failure to assert any claim to exclude Registrant from using either of Registrant's registration Nos. 2740030 or 2842218 for the period beginning on the April 29, 2003 opposition publication date for registration No. 2740030 and ending on the August 17, 2010 filing date of the Petition has led Registrant to reasonably rely upon Petitioner's inaction and conclude therefrom that it could spend significant resources to develop a highly successful enterprise involving its adoption and use of the subject Mark, without fear of its having to defend its rights in the Mark from challenges by Petitioner.

4. Registrant's Mark is not likely to be confused with any of WHATABURGER or WHATA Marks described as items (a) through (n). Registrant's applications for its Registration Nos. 2740030 and 2842218 were both duly examined by USPTO Examining Attorneys with constructive notice of the existence of all 14 of Petitioner's registrations for WHATABURGER and WHATA Marks designated as (a) through (n),. The USPTO Examining Attorneys did not refuse registration of either of Registrant's 2740030 or 2842218 marks on the basis of possible confusion with any of Petitioner's 14 WHATABURGER or WHATA Marks, thus refuting Petitioner's assertion of confusion.

5. Petitioner's Petition to Cancel is barred by the Doctrine of Unclean Hands based upon the following facts. Petitioner failed to assert any legal claim regarding Registrant's word Mark WHAT A LOT A PIZZA, Reg. No. 2740030, instead allowing that registration to lapse pursuant to Section 8 of the Trademark Act for failure to file a declaration of continued use. The foregoing tactic could have been used by Petitioner to allow cancellation by operation of law pursuant to Section 8 of the Trademark Act of Registrant's No. 2842218 for WHAT A LOT A PIZZA and design, since that Registration would have been cancelled under Section 8 on November 18, 2010 in the absence of Registrant filing a Declaration of Continued Use by Registrant on or before November 18, 2010. Instead, Petitioner has filed the present Petition which has required Registrant to divert significant resources to answer the Petition that would otherwise be available to sustain and grow its successful business.

WHEREFORE, Registrant respectfully prays that the Petition to Cancel of Registrant's trademark No. 2842218 be denied and that the Petition be dismissed forthwith.

Respectfully submitted,

Dated: October 26, 2010

// William L. Chapin//

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I served the foregoing ANSWER TO PETITION TO CANCEL upon counsel for Petitioner by causing a copy thereof to be deposited in the United States Mail, first class postage prepaid and addressed as follows;

Jennifer L. Elgin, Esq.
Wiley Rein, LLP
1776 K Street, NW
Washington DC 20006

The 26th day of October, 2010
Newport Beach, California

// William L. Chapin//

WILLIAM L. CHAPIN